

**PROPOSAL 1: DRAFT RULE TO PERMIT CITATION OF
ARIZONA AND NON-ARIZONA UNPUBLISHED DECISIONS**

Rule 111. Publication of Opinions of the Supreme Court and Court of Appeals; Citation Rules; Depublication

(a) Types of dispositions.

1. An opinion is a written disposition of a matter by the Supreme Court or Court of Appeals that is distributed for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07 and intended to be precedential.
2. A memorandum decision is a written disposition of a matter by the Supreme Court or Court of Appeals that is not intended to be reported by publishing companies, and is not intended to be precedential. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.

(b) When disposition shall be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

(c) Designation of written disposition. The written disposition of the case shall contain in the caption thereof the designation “Opinion”, “Memorandum Decision”, or “Order.”

(d) Mixed designation. When the court issuing a decision concludes that only a portion of that decision meets the criteria of subsection (b) above for an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision.

(e) Citation of memorandum decisions and orders. Memorandum decisions and orders may be cited only in the following circumstances in accordance with the following procedure:

1. A memorandum decision or order may be cited to establish a fact about the case before the

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court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, or other similar doctrine.

2. Citation of a memorandum decision or order is otherwise disfavored, but may be cited if: (1) the party believes that the decision persuasively addresses a material issue in the case; and (2) there is no published opinion from the Supreme Court or Court of Appeals that adequately addresses the issue. Such decisions or orders may be considered by the court for their persuasive value only, and not as binding precedent.

3. A party must note in its brief or other pleading that the decision is unpublished, and a copy of the decision or order must be included in an accompanying addendum or appendix.

(f) Decisions from other courts. Memorandum, unpublished or non-precedential decisions or orders of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (e)(1) above. Such decisions or orders may also be cited in circumstances analogous to those set forth in subsection (e)(2) above unless prohibited by the rules of the issuing court. When such a decision or order is cited, the party must comply with the procedure set forth in subsection (e)(3) above.

(g) Publication of dissenting vote on denial of petition for review. If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals.

(h) Depublication. In a case that is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action, the Supreme Court may, before the opinion, memorandum decision, or order becomes final, enter an order indicating that the opinion, memorandum decision, or order not be published or cited. Such an opinion, memorandum decision, or order may not be cited other than pursuant to subsection (e)(1) above.

(i) Effective date. This rule shall be effective as of 1 December 2009, and shall apply to all opinions and memorandum decisions issued by the Supreme Court and Court of Appeals after the effective date. Upon its effective date, this rule shall apply to decisions from other courts, regardless of when the decisions were issued.

Comment: Subsection (a)(2) adopts a new rule that requires memorandum decisions to be readily publicly available in electronic format, for example via the internet.

Subsections (a) and (e) clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by Arizona state courts, contrary to the prior rule as interpreted in several cases. *See, e.g., Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) (“We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.”)

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Section (f) clarifies when decisions issued by other jurisdictions may be cited.

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~~(a) Definitions.~~

(a) Types of dispositions.

1. An opinion is a written disposition of a matter ~~which is intended for publication under (4) below~~ by the Supreme Court or Court of Appeals that is distributed for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07 and intended to be precedential.

2. A memorandum decision is a written disposition of a matter ~~not intended for publication~~ by the Supreme Court or Court of Appeals that is not intended to be reported by publishing companies, and is not intended to be precedential. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.

3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.

~~4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. §§ 12-107, 12-108, and 12-120.07.~~

(b) When disposition ~~to~~ shall be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

~~(c) Dispositions as Precedent. Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.~~ **(d) Designation of written disposition.** The written disposition. The written disposition of

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the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order.", or "Order."

(d) Mixed designation. When the court issuing a decision concludes that only a portion of that decision meets the criteria of subsection (b) above for an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision.

(e) Citation of memorandum decisions and orders. Memorandum decisions and orders may be cited only in the following circumstances in accordance with the following procedure:

1. A memorandum decision or order may be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, or other similar doctrine.

~~(e) This rule shall be effective as of 1 September 1973.~~

2. Citation of a memorandum decision or order is otherwise disfavored, but may be cited if:
(1) the party believes that the decision persuasively addresses a material issue in the case; and
(2) there is no published opinion from the Supreme Court or Court of Appeals that adequately addresses the issue. Such decisions or orders may be considered by the court for their persuasive value only, and not as binding precedent.

3. A party must note in its brief or other pleading that the decision is unpublished, and a copy of the decision or order must be included in an accompanying addendum or appendix.

(f) Decisions from other courts. Memorandum, unpublished or non-precedential decisions or orders of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (e)(1) above. Such decisions or orders may also be cited in circumstances analogous to those set forth in subsection (e)(2) above unless prohibited by the rules of the issuing court. When such a decision or order is cited, the party must comply with the procedure set forth in subsection (e)(3) above.

(g) Publication of dissenting vote on denial of petition for review. If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

~~(g) Depublication. Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which~~
h) Depublication. In a case that is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered, the Supreme Court may, before such the opinion, memorandum decision, or order becomes final, enter an order indicating

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that the opinion, memorandum decision, or order not be published or cited. Such an opinion, memorandum decision, or order may not be cited other than pursuant to subsection (e)(1) above.

(i) Effective date. This rule shall be effective as of 1 December 2009, and shall apply to all opinions and memorandum decisions issued by the Supreme Court and Court of Appeals after the effective date. Upon its effective date, this rule shall apply to decisions from other courts, regardless of when the decisions were issued.

Comment: Subsection (a)(2) adopts a new rule that requires memorandum decisions to be readily publicly available in electronic format, for example via the internet.

Subsections (a) and (e) clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by Arizona state courts, contrary to the prior rule as interpreted in several cases. See, e.g., *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) (“We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.”)

Section (f) clarifies when decisions issued by other jurisdictions may be cited.

~~(h) Memorandum Decision. [FN1] When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.~~

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Rule 111. Publication of Opinions of the Supreme Court and Court of Appeals; Citation Rules; Depublication

(a) Definitions.

1. An opinion is a written disposition of a matter that is intended for publication under (4) below.
2. A memorandum decision is a written disposition of a matter not intended for publication. The court issuing the memorandum decision shall arrange for it to be readily publicly available in electronic form.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.
4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § § 12-107, 12-108, and 12-120.07.

(b) When disposition to be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
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if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

(c) Dispositions as Precedent. Memorandum decisions issued by the Supreme Court or Court of Appeals shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Memorandum or unpublished decisions issued by other jurisdictions may be cited to any Arizona court for persuasive purposes unless citation for such purposes is prohibited by the rules of the issuing court. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

(d) Designation of written disposition. The written disposition of the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order."

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(e) Effective date. This rule shall be effective as of 1 December 2008.

(f) Publication of dissenting vote on denial of petition for review. If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

(g) Depublication. Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

(h) Mixed designation. When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.

Comment: Section (c) is amended to allow the citation of decisions issued by other jurisdictions if the decision could be cited under the issuing court's rules, and to clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by the Arizona Supreme Court and Arizona Court of Appeals, contrary to the manner in which the prior rule was interpreted. *See, e.g., Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) ("We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.").

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4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § § 12-107, 12-108, and 12-120.07.

(b) When disposition to be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

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(d) Designation of written disposition. The written disposition of the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order."

(e) Effective date. This rule shall be effective as of 1 ~~September 1973~~ December 2008.

(f) Publication of dissenting vote on denial of petition for review. If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

(g) Depublication. Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

(h) ~~Memorandum Decision.~~ [FN1]Mixed designation. When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.

Comment: Section (c) is amended to allow the citation of decisions issued by other jurisdictions if the decision could be cited under the issuing court's rules, and to clarify that the restriction on the citation of memorandum decisions applies only to decisions rendered by the Arizona Supreme Court and Arizona Court of Appeals, contrary to the manner in which the prior rule was interpreted. See, e.g., *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions by the United States District Courts are governed by Rule 28(c), *Ariz. R. Civ. App. Pro.*) and *Walden Books Co. v. Department of Revenue*, 198 Ariz. 584, 589, 12 P.3d 809, 814 (Ct. App. 2000) ("We hold that ARCAP 28(c) applies to memorandum decisions [sic] from any court.").